Supreme Court, U.S.
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No. 95-1648

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

BRIAN WECHSLER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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June 5, 1996

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APPENDIX C

Excerpt of Motion to Suppress Hearing

March 18, 1993

reasonable belief in the officers' minds that they know it's his property, for purposes of a warrant issue.

MS. LAIR: Well, the officers undoubtedly knew that the bags were his. I mean everything pointed to the bags being his.

THE COURT: It's overpowering that the bags are his. There's no question the bags are his.

MS. LAIR: The question is, not what the officers believed but whether once he has a possessory interest in it and a privacy right in those bags, whether or not he gives that up. And that's what he did.

THE COURT: All right, let me hear from Mr. Zwerling.

MR. ZWERLING: Judge, the Holloway case which is the one case in Virginia, the defendant was asked -- I think it was a train -- they find three bags above the defendant, a gray one in which they find money, and two brown ones that

nobody claims. And they're asked, who do those bags belong to? We don't know. We don't know.

That's pretty much the same as they're not my bags. That wound up in suppression. I would point out, Your Honor, that when they left -- when they detained him, not when they put the hand in front of him, but when they stopped him and said you're coming with us, you're not free to leave -- I think the Court needs to understand the credibility issue to some extent.

They -- Officer Kahn said he wasn't sure until he field tested that substance that it wasn't marijuana.

THE COURT: And then you had him smell the bag and he immediately said no, it's not marijuana.

MR. ZWERLING: That's right, and if he had any doubts in his mind about whether it was marijuana, wasn't just looking for a hook, something cute to do something with, he would have smelled it right then and there. That wasn't the reason that Mr. Wechsler was taken down, that's not why he was detained.

He was detained for other reasons and that was to pursue their investigation, whether or not they had enough in

the quote, eyes of the Court is one thing, but Doug Kahn clearly couldn't think that they had enough because he had to make this thing about I thought it was marijuana up. I submit that was made up.

But the point is this: The vast majority of what the government is relying on took place after the man was in custody and either hadn't been Mirandized or had exercised his rights. And this Court should give no credence to that to help the government out, the Commonwealth out on this.

They should not be able to profit by anything that he was tricked into saying or doing down at that station prior to being Mirandized and yet while in custody, or subsequent to asking for a warrant. That is just fundamentally unfair; it strikes at the very liberties for which the Constitution and the Bill of Rights were enacted.

And that has got to be discouraged. If this Court does not suppress it will not be discouraged, it will be routine, because it will be approved, it will now be approved conduct. I don't think that's a conduct that should be approved, especially under the facts where they knew whose bag it was, it had his name on it.

If the Court will look at I think 2C, 2B - -

THE COURT: Mr. Zwerling, I don't know how many times I can say it. Everybody knew whose bags they were.

MR. ZWERLING: So as to the standing

--- I don't know if I need to address that -- the bag has his name on it.

THE COURT: Oh, I think you can keep standing even when you lie. I don't think lying forfeits property rights or standing.

MR. ZWERLING: Everything that he did, Your Honor, that created a lie -- when he lied to them and said they're not my bags they knew it was a lie. And that might go to help them show that he had guilty knowledge, help them with probable cause, help them with reasonable suspicion. But not help them do away with a requirement for a warrant.

That it doesn't do, because they never believed nor would any reasonable person believe the false exculpatories that this man gave after he was in custody and while he was being either interrogated directly or by being confronted with things which would make him likely to make statements.

And if the Court will look at the law in Virginia, the Holloway case, 9 Virginia --

THE COURT: I want to read that before I rule.

MR. ZWERLING: -- it says "every disclaimer of ownership of personalty, however, does not conclusively establish an intent to relinquish one's expectations to privacy."

That's really what this Court is being asked to decide. Did Mr. Wechsler in the Court's view on the facts here intend to relinquish is expectation of privacy of those bags. That's the test, that's the test for abandonment. Clearly he did not, I submit. He said get a warrant; I don't want you in there; can I go; everything he could. He just couldn't come out once he was in custody and confess that yes, when you find the marijuana in there it's mine, those are my bags. He just couldn't do that.

And he shouldn't be required to have to do that. He doesn't understand Simmons. He doesn't understand Edwards, that if they question him after he invokes his rights

they can't use it against him later on. He doesn't know that. He can't be required to know that.

That's all I have.

THE COURT: Mr. Zwerling, recognizing it's not really the issue, to what extent does the theory of inevitable discovery touch here in any way that has any persuasive weight?

MR. ZWERLING: I don't think it has any in this case. First of all, I don't think there's probable cause. Second of all, they were not -- if the Court reads Williams or any of those other cases, they were in the process of finding the evidence, and that's why it was inevitable.

THE COURT: But let's assume that Kahn and the other agent, Jacobsen, say to him, you're free to go but the bags stay here.

MR. ZWERLING: And then did what, then went --

THE COURT: And went down and got a warrant.

MR. ZWERLING: And then if they -- well, we don't know what they would have done. That's number one.

THE COURT: He testified that he had an open mind and he was going to go one way or the other depending on the answer.

MR. ZWERLING: No, he said -- all -- he admitted all in his mind he had was a suspicion. He never said he thought he had probable cause.

THE COURT: Well, that doesn't govern what -- the total circumstances are such that if this man when Kahn asked him the last time whether it's his bag or not says one way or the other, including I refuse to answer, but if it's yes, the implication is clear in my mind and I accept Kahn's credibility at face value for everything he said he was motivated by and what he did.

He says we then have to decide whether we get a warrant or not. Well, let's assume that's the choice that faces them. This man, allow him to go, keep the bags, we've got his marijuana.

MR. ZWERLING: Well, number one, then deciding whether to get a warrant --

THE COURT: You can attest the validity of the warrant, a reasonable basis for it and everything else.

MR. ZWERLING: That's number one. Number two, you would have the presumptions of the magistrate, you would have the process that the Constitution requires. And in Sigora (phonetic) and in all the other cases really, Whitehorn, where you have inevitable discovery decided, the police -- they did something wrong. In Sigora they went in and secured the apartment from the inside and saw things in plain view while people were getting a warrant. Then they came back with the warrant and they found all this stuff anew, and other stuff. And the Supreme Court said well, look, what they found inside had no effect. They didn't use what they found to bolster the search warrant affidavit or anything else, so put this aside and look at what happened and determine whether they would have found it inevitably because they went and they got the warrant and did everything right.

In Whitehorn it was the same thing.

THE COURT: I understand, I'm misapplying -- the word discovery is really the key to inevitable discovery, you were going to find it anyhow. Here there's no finding issue, it's a question of opening it.

MR. ZWERLING: That's right, and they disregarded the requirement of the Fourth Amendment to get a warrant. And although there have been lots of exceptions that have grown up and almost swallowed the rule, the Constitution still says -- and the case law say this -- warrantless searches are per se unreasonable except for a limited group of exceptions. And if in a case like this we let -- well, good cops, good leads probably would have gotten it anyway -- swallow the warrant requirement, we don't have a warrant requirement, I submit.

If it's to have any validity and vitality it's for the Courts to protect it. It is a sick child, I admit, but it needs to be protected by the Courts.

THE COURT: Let me see Holloway, please.

Take a break, it'll take me at least a couple of minutes to read this. Counsel are free to take a stretch.

(Pause to review documents.)

THE COURT: Let me ask counsel a question. Commonwealth -- Holloway is helpful, but Judge Tidy (phonetic) from Henrico made certain fact-findings in that including he didn't accept the credibility of the agent who

somehow knew things were happening three hours before they happened.

And there was no tying of the suspect in Holloway to the alleged suspicious change of trains. Or the timing of payment or any of these indicia supposedly raising the suspicion of a drug courier.

But aside from all that specific factual information from Holloway, on page eighteen of the photocopy given to me it says the determination of abandonment has two particularly important factors. One is denial of ownership and two is physical relinquishment of the property.

Didn't this defendant relinquish the property when he went to the cab?

MR. ZWERLING: No, Your Honor. Because he was in a bail position. It's not like he left it on the sidewalk.

THE COURT: Well, that's part of the case law they analyze there, if somebody leaves a car for two or three hours in an unusual place, not a parking lot.

MR. ZWERLING: Right.

THE COURT: And they make the point at page nineteen if you walk away from your luggage in an airport you haven't abandoned it. But isn't it clear that this defendant was intending to get in that cab and leave the airport because he had seen who was looking at him?

MR. ZWERLING: That is a conclusion the Court could make.

THE COURT: And I do.

MR.ZWERLING: He was going to come back later --

THE COURT: I factually find that when he got off that plane and he started looking at these two agents he decided that he had a problem with that luggage, and therefore he got to that cab to get out of there.

MR. ZWERLING: That's right, and come back -- I don't think -- I mean it had his name on it, Judge.

THE COURT: Oh, he could come back and get it later.

MR. ZWERLING: Right, and I think that with his name on the luggage, if he left it there forever it would be opened and traced to him. So I think the fair conclusion is that he was not going to pick it up in the presence of those officers,

he might wait until their shift ended, come back in four or five hours, and then with his stubs retrieve it before --

THE COURT: Or have somebody else bring the stubs back.

MR. ZWERLING: Exactly. But I don't think that a fair reading would be that he had abandoned it as if he had left it on the sidewalk and was not coming back, and it was in a bailor or bailee position just like as if he had left his car at a lot, and he'd gone from the airport to the car, saw the police and then went back and got into a cab. He didn't abandon it, he just wasn't going to pick it up at that point in time.

He didn't give up his expectation of privacy in that as to the world.

THE COURT: It's a troublesome case, particularly when you have the prosecutor sitting on the phone advising the officers and what is going on in the flow of information, but having found Kahn to be credible and accepting what he claims to be his motivation and his state of mind as he went, I'm going to deny the motion to suppress relying on the language from Holloway that I was just talking about.

I find that when the defendant went to the cab he had ID'd those two narc or DEA people, whatever you want to call them. He knew that they were looking at him. He went to the cab to leave the area. The relinquishment of the luggage occurred when he went to the cab.

There follow after that subsequent disclaimers of ownership of the property and he thereby surrendered his expectation of privacy in the property even before they get downstairs and question him in the substation which one might argue is an illegal custodial interrogation and therefore his express abandonment or denial of ownership cannot be used against him because it would be intertwined with illegal police activity.

But I find his relinquishment occurs when he gets into the cab or tries to get into the cab, having identified the narcotics officers. His disclaimer starts immediately after they start questioning him in a voluntary exchange of information out by the cab.

MR. ZWERLING: Your Honor, what about his statement to them when confronted with the tickets, the stubs, of well, I guess I do have luggage?

THE COURT: That's why I was so troubled by the concept that they know whose luggage it is.

MR. ZWERLING: Well, I mean isn't that -- I mean that's not only not a neutral situation, it's a positive claiming of the fact that he has the luggage that matches those stubs.

THE COURT: But if they know that he had what we might call title to or the right to possession of the luggage, that doesn't mean they know he's going to assert it. And it's important in Holloway. And Judge Tidy's fact-findings and Judge Barrow's opinion in Holloway make it important that that defendant didn't really say much of anything.

MR. ZWERLING: But here you have an individual who was prevented from getting in the taxicab while he was attempting to do it initially saying I don't have bags. Then when they find 2B, which has numbers on it and his name, he says yeah, I guess I have bags.

That is an admission that he has bags that match those claims.

THE COURT: I find that his overall message to the officers was he wasn't going near those bags. He was denying

anything to do with those bags and he was doing it clearly, I don't have anything to do with those bags.

Now, that's somewhat clouded and contradicted by the argument that you now make coupled with his later comment about you can't do that without a warrant, and there's a question of what is going on there, how custodial is this, how appropriate is any conversation they're then having.

But I find that he has conveyed to the officers two things: The physical act of departing the airport and going to the cabs; that is a part of their reasonable conclusion that he has denied ownership or has ceased to exert any expectation of privacy over those

And I frankly make that ruling very troubled by why once they have a U.S. attorney on the phone they don't just go ahead and get a warrant. But I'm going to leave that not decisive. What is decisive is the language of Holloway and the peculiar facts and circumstances of this case.

It's his going to the cab after clearly identifying the narcotics officers; his clear intent to leave the property of National Airport; his clear implied intent to abandon the bags, coupled with subsequent expressed disclaimers about it; his

expectation of privacy; therefore the opening of the bags does not cause suppression of the evidence.

MR. ZWERLING: Can I ask the Court to address one point that's troubling me about this? If the agents after talking to the U.S. attorney are ambiguous enough in their own minds as to whether or not they -- he had abandoned at that point his rights over that luggage, and he had to go back and --

THE COURT: That's why I asked Kahn the question, whose luggage did you think that was. And what if he'd said either way, yes, no or in between. I mean those were a couple of things I wanted to -- I wanted to extract from Kahn, what were you thinking when you went back to him. What were you going to do if he said yes, they're mine or didn't answer.

but I've resolved those facts with the way that I've tried to explain. What you're talking about is a part of the overall exclusionary rules underlying philosophy and that is, not just clearly improper police conduct should have a price paid against government and in favor of a defendant, whether he's guilty or not. But it also goes to the well-meaning officer who really is in doubt, and does the prophylactic concept mean

you just don't knock out evidence as a policy rule for wrong-doing officers, but you also tend to lean in favor of suppression against officers who could have clearly taken a more discreet cause of action, particularly when they've got the U.S. attorney on the other end of the phone.

That interchange with the prosecutor frankly caused me real problems, but I've resolved it the way I've resolved it. In that the officers prior to that point had had both the physical demonstration of relinquishment of the possession and rights to privacy, and they'd had express verbal relinquishment, too.

Therefore, the motion to suppress is denied. Interesting question, though, as to whether you are moving to suppress the statements made in the substation, the luggage or all of the above.

MR. ZWERLING: I think the Commonwealth is not going to try to use those statements.

MS. LAIR: We're in agreement on that, Your Honor.

THE COURT: All right. Thank you.

(Whereupon, at approximately 4:15 o'clock p.m., the hearing in the above-entitled matter was concluded.)

APPENDIX D

COMMONWEALTH OF VIRGINIA

VS CR93-197-98

BRIAN WECHSLER

THE 18th day of March, 1993 came the Commonwealth of Virginia, by its Attorney, Margaret Evelyn Lair, the Defendant pursuant to his recognizance and his Retained Attorneys, John Kenneth Zwerling and Lisa Kemler.

WHEREUPON this case came before the Court on the Defendant's "Motion to Suppress" and argument of counsel and sworn testimony were heard on same.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the Defendant's motion be and it hereby is denied.

THEREUPON the Court ordered that this case be and it hereby is continued to April 12, 1993 for trial by jury.

IT IS FURTHER ORDERED by the Court that the appearance bond herein remain in full force and effect.

Entered this 1st day of April 1993.

/s/ Paul F. Sheridan

JUDGE

APPENDIX E

Excerpt of Motion to Reconsider Hearing

July 16, 1993

denial of ownership is a denial of ownership. What his intentions were in denying ownership is his own business. But they go to -- a reasonable expectation of privacy, and when you say with baggage claims in front of you that those aren't your bags you are abandoning that property.

THE COURT: Well, I was somewhat troubled at the time. And it comes up on 94 and 95 of this transcript. What if the officers knew that they clearly were his bags even while he was denying it? But I struggled with that at the time we did this.

To what extent the abandonment by express denial that they're his is contradicted by a reasonable set of facts that tell the officers they really are his bags while he's standing there denying it. To what extent does his expression which could constitute abandonment get neutralized by the knowledge reasonably in front of the officers that is abandonment can't be real.

But I've resolved that. And I don't change my mind on that.

MS. LAIR: I'd just like for the Court to consider that the one argument that he reasserted, his right to ownership and privacy in his bags, is a moot point when you consider his final and definitive assertion that they are not his bags, and it wasn't until his assertion and the unequivocal response of the defendant when they asked -- when the agents asked are these your bags or aren't these your bags, he replied no.

And it wasn't until he said that that they opened up the bags.

THE COURT: Anything else?

MS. LAIR: No, Your Honor.

MR. ZWERLING: Just briefly --

MS. LAIR: He has one final motion but not on this --

THE COURT: Well, let me -- I'm reading from the transcript of 94 through 96 here, the dialogue I have with Mr. Zwerling and then the fact findings by the Court.

Page 97, line 16, the Court Reporter says that I said the word substant. Is that substantial, substantive, subsequent -- I can't interpret from the reading. But I don't believe I've

ever used the word substant either as counsel or as Judge, but whatever it means -- I was trying to explain the analysis factually there and I'm rereading it now.

(Pause.)

MR. ZWERLING: Page 120, Your Honor --

THE COURT: I'm also stopped on 106/107 where I'm talking to the Commonwealth attorney about why do they need to ask him whose bags they are.

(Pause.)

108, I make the comment, it'd be an easy question to decide if the defendant had kept quiet but the defendant repeatedly sent mixed messages, the dominant message though being those bags aren't mine.

Bottom 108, top 109, the question I was struggling with, to what extent can the defendant's claim of not having anything to do with the property overcome a reasonable belief in the officers' minds that they know it's his, for purposes of a warrant.

I reiterate at the bottom of 111, Mr. Zwerling, everybody knew whose bags they were. Or should have known.

Page 115, I make the fact finding that I accept the credibility of -- is it Agent Kahn?

MR. ZWERLING: Yes, Your Honor.

THE COURT: As to what his real state of mind was, it wasn't a subterfuge that was going on.

Judge Tidy in the case of Henrico at page 117, I made the reference, Judge Tidy did not accept the credibility of the officer.

And then I explain my fact findings on 120, 121. All the way to 123 I explain my fact findings and conclusions, interpretation of Holloway; Judge Barrow's opinion in Holloway, Judge Tidy's fact findings is referenced to.

Bottom of 123, line 16 through 22, I make a summary of certain fact findings. Page 125 I summarize the fact finding that the defendant had shown a physical -- this is line 7 -- a physical demonstration of relinquishment of the possession and rights to privacy and at line 9 they had expressed verbal relinquishment.

The motion to reconsider is denied.

MR. ZWERLING: I'm going to ask the court just to -- is that what I think the Court didn't focus on --

THE COURT: Was the state of mind of the defendant and his expectation of his property rights.

MR. ZWERLING: Number one. Number two, on page 80 and 81 of the transcript at the bottom, it says as we were walking to the terminal I stated, then you do have luggage. Excuse me, when I showed him the baggage tickets he said I guess I do have luggage.

So the last thing he said before they took him downstairs was yes, I do have luggage when they showed him the --

THE COURT: Top of 81.

MR. ZWERLING: Top of 81. Then the rest of the question has got to be excluded because it was in violation of his assertion of right to counsel. Except for when they bring the bags and they say, do you mind if we search these? And he says, not without a warrant.

It's my position that the very last thing that have that is legitimately available to them was a assertion, yes, I do have bags and that you can't go in those without a warrant. And that he had reasserted anything he may have abandoned prior to that time.

THE COURT: Abandonment can occur through conduct and statement equivocal in nature, where you can take a part of the physical pattern for one or several statements out of the collection and say that the person asserted ownership and/or an expectation of privacy and/or a possessory interest while the totality of information and conduct conveys reasonably abandonment.

I found abandonment. I still find it. it's a fascinating case, though.

MR. ZWERLING: Well, I hope we can get it to the Court of Appeals, Your Honor, without having to subject my client to a jury sentence.

THE COURT: A lot of Judges could disagree with that result reasonably.

MR. ZWERLING: Your Honor, we now have a motion for a pretrial ruling on the Code section, 18.2248.01. And the reason this is important to determine pretrial is because I need to know whether in order to get this case to the appellate courts I'm risking forty or seventy years of jury discretionary range on a sentence.

The statute in question has the language that it is to be considered a separate and distinct felony. I guess from any oth[illegible]elony, the Commonwealth doesn't refer to anything in particular. And then it sets a sentencing range of five to forty years.

Now, possession with intent is five to thirty under these circumstances. And I'd point out that

APPENDIX F

COMMONWEALTH OF VIRGINIA

VS CR93-197-98

BRIAN WECHSLER

THE 16th day of July, 1993 came the Commonwealth of Virginia, by its Attorney, Margaret E. Lair, the Defendant pursuant to his recognizance and his Retained Attorney, John Kenneth Zwerling.

WHEREUPON this case came before the Court on the Defendant's motion to reconsider this Court's previous decision denying the Defendant's motion to suppress, and argument of counsel was heard on same.

UPON CONSIDERATION WHEREOF, it is the opinion of the Court that the Defendant's motion be and it hereby is denied over the objection of the Defendant.

THEREUPON the Defendant, after being fully advised by his Attorney, personally waived his right to trial by jury and requested that the Court should hear and determine this case without intervention of a jury, and

IT APPEARING to the Court that the Commonwealth of Virginia objected to the waiver,

IT IS ACCORDINGLY ORDERED by the Court that this case be continued to July 26, 1993 for a jury trial.

IT IS FURTHER ORDERED by the Court that the appearance bond herein remain in full force and effect.

Entered this 10th day of August, 1993.

/s/ William Newman

JUDGE